

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TENNESSEE
3 AT KNOXVILLE, TENNESSEE

3 _____))
4 SNMP RESEARCH, INC. and SNMP)
5 RESEARCH INTERNATIONAL, INC.,)
6 Plaintiffs,)
7 vs.) Case No. 3:20-cv-451
8 EXTREME NETWORKS,)
9 Defendant.)
10 _____))

11 ELECTRONICALLY-RECORDED DISCOVERY CONFERENCE
12 BEFORE THE HONORABLE DEBRA C. POPLIN

13 Wednesday, November 1, 2023
14 1:30 p.m. to 4:05 p.m.

15 APPEARANCES:

16 ON BEHALF OF THE PLAINTIFFS:

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ON BEHALF OF THE DEFENDANTS:

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Terminated Defendants: Broadcom, Inc.,
and Brocade Communications Systems, LLC

* * * * *

1 THE COURTROOM DEPUTY: All rise.

2 This court is again in session with the
3 Honorable Debra C. Poplin, United States Magistrate
4 Judge, presiding.

5 Please come to order and be seated.

6 We are here for a discovery conference in Case
7 3:20-cv-451, SNMP Research, Incorporated versus Extreme
8 Networks, Incorporated.

9 Here on behalf of the plaintiffs are John Wood
10 and Olivia Weber.

11 Is the plaintiff ready to proceed?

12 MR. WOOD: Yes.

13 THE COURTROOM DEPUTY: And here on behalf of
14 the defendants are John Neukom, Saurabh Prabhakar,
15 Charles Lee, and Alison Plessman.

16 Are the defendants ready to proceed?

17 MR. NEUKOM: We are, except Ms. Plessman is not
18 counsel for Extreme; she is counsel for Brocade --

19 THE COURT: Okay. Yes.

20 MR. NEUKOM: -- a non-party.

21 THE COURT: Yes. I remember Ms. Plessman.
22 Thank you.

23 All right. Good afternoon to you all.

24 So, I have reviewed your position statements.

25 The first one I believe you all are calling the document

1 production, and, Mr. Wood, you're going to take the
2 argument on that on behalf of plaintiffs; correct?

3 MR. WOOD: Yes, Your Honor.

4 THE COURT: Okay. And then responding to that
5 issue -- can you pronounce your last name for me,
6 please.

7 MR. PRABHAKAR: Your Honor, Saurabh Prabhakar.

8 THE COURT: Prabhakar. Thank you very much.
9 So, I see that you're going to take the lead for that
10 argument as well.

11 MR. PRABHAKAR: Yes, Your Honor. You're
12 referring to the discovery issues?

13 THE COURT: Yes.

14 MR. PRABHAKAR: Sorry. I couldn't hear the
15 first of what you said.

16 THE COURT: So, that's what we will take up
17 first. And, Mr. Wood, even though this is your request,
18 I do want to ask that we start out by having Extreme
19 give the Court a purely factual timeline of what
20 happened, starting with when you received the request,
21 and I want you to follow that timeline all the way
22 through to the claw-back request. So, can you do that
23 for me, and, again, just keep it a factual timeline.

24 MR. PRABHAKAR: Your Honor, may I ask for a
25 quick qualification?

1 THE COURT: Yes.

2 MR. PRABHAKAR: The claw-back issue is tied
3 with the common-interest issue, but did you want --

4 THE COURT: It's tied a little bit --

5 MR. PRABHAKAR: Yes.

6 THE COURT: -- but I would just like a full
7 factual timeline. Sorry. We're getting a little
8 feedback. So, I don't know if Mr. Neukom needs to
9 address --

10 MR. PRABHAKAR: I'm happy to --

11 THE COURT: -- some of that.

12 MR. PRABHAKAR: -- cover that, Your Honor.

13 THE COURT: Okay.

14 MR. PRABHAKAR: And I may ask Mr. Neukom for
15 his help if I need it.

16 MR. NEUKOM: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. NEUKOM: It's nice to be back in your
19 courtroom after 20 months.

20 THE COURT: Are you enjoying the fall leaves?

21 MR. NEUKOM: Exactly. I am planning to cover
22 the privilege issue, but I think for the timeline of the
23 claw back and the discovery, the Court will find
24 Mr. Prabhakar far more useful than me.

25 THE COURT: Okay.

1 MR. NEUKOM: So, I'm happy to yield the podium
2 to him on that.

3 MR. PRABHAKAR: Thank you, Mr. Neukom.

4 Your Honor, so, I can start with the --

5 (A discussion was had off the record amongst
6 the Courtroom Deputy and the Court.)

7 THE COURT: Yes. We're recording, and, so,
8 it's a little bit -- you can stay there, but I can hear
9 a little bit better if you come to the podium.

10 MR. PRABHAKAR: Yes. Of course, Your Honor.

11 So, Your Honor, the discovery issues that are
12 before you and the documents that were clawed back all
13 relate to document requests from plaintiffs which were
14 responded to by Extreme sometime -- I think on the 23rd
15 of March of this year. And in response to that and as
16 you may remember previously, several new products from
17 Extreme dating back to 2001 were added to the case, and,
18 therefore, the productions related to the prior
19 doc- -- products that were in the case was already
20 covered.

21 So, in March 23rd, 2023, we produced over 30-,
22 40,000 documents related to the EXOS line of products
23 and the EOS line of products. Some of those requests
24 that we responded to related to the marketing documents
25 that are at issue. There were also the install images

1 which were covered in a previous discovery issue that
2 was before the Court. I joined this case sometime in
3 June, and I add that because I may be missing some
4 context and I may have to go back to Mr. Neukom to
5 confirm that.

6 So, in June, we started meeting and conferring
7 on several of these issues. Then, as part of another
8 production, we produced recently -- I'm sorry. I just
9 need some water.

10 THE COURT: Oh, it's fine. Actually, I'm going
11 to ask if we can maybe get the temperature turned down
12 in here, if you don't mind.

13 MR. PRABHAKAR: Okay. Sorry about that, Your
14 Honor.

15 So, in March 2023, Extreme made a large
16 production of documents that related to the EXOS line of
17 products that were added to the case earlier this year.

18 Starting June, the parties meeting -- started
19 meeting and conferring on various issues related to the
20 documents that were produced then. The marketing
21 documents were part of that dispute. The install images
22 were indirectly now in dispute because the previous time
23 this issue was raised with the Court, only the SLX and
24 MediaX line of products were at issue.

25 The other side identified several deficiencies,

1 many of which were, in fact, not deficiencies. Many of
2 these deficiencies were not identified with sufficient
3 particularity so that we could properly investigate what
4 is actually missing.

5 On the install images, we worked with the
6 defendants -- or, sorry -- the plaintiffs to impress
7 upon them that we have produced over a thousand copies
8 of source code for various Extreme products and,
9 therefore, the install images are irrelevant.

10 We kept meeting and conferring, and every time
11 we met and conferred, new issues came up in the case.
12 And I mention that because it's kind of a running
13 hopper. We go back, ask Extreme for certain updates.
14 Defendant -- or plaintiffs come back, ask for more
15 information. We go back to the -- to our client, and,
16 therefore, things kind of get wrapped up because there
17 are a lot of feral threads.

18 In the middle of all of this there was an old
19 thread from March of this year that related to privilege
20 logs and, more specifically, we had responded to the
21 privilege log issue in May of 2023, explaining why
22 certain privilege issues weren't raised or why certain
23 privilege entries were made.

24 We didn't hear from this -- on this issue from
25 plaintiffs until July, and that's the first privilege

1 issue that came up, which is the common-interest
2 privilege issue between -- communications between
3 Extreme, Brocade and Broadcom.

4 While all this was going on, we kept addressing
5 plaintiffs' deficiencies on various different topics.

6 While all of this was going on, the deficiencies in
7 marketing documents came up. The first time the
8 deficiencies in the marketing documents were raised,
9 there were no specific requests that were identified to
10 which our responses were deficient. The issue came up
11 sometime in July. We kept talking about various other
12 issues, and then the Brocade/Broadcom/Extreme
13 common-interest issue came to a head.

14 When briefing was being done on this issue,
15 first time in plaintiffs' opening brief, they
16 reflected -- they identified certain documents that they
17 claim that we had produced which were not privileged,
18 and that's what led us to investigate that these
19 documents should not have been produced in the first
20 instance because they seemed privileged. We went back
21 after we saw that brief, we investigated, and we did a
22 first claw-back notice. That was done sometime in
23 August.

24 Then as part of that claw back, we had also
25 recently produced a consolidated privilege log which

1 rolled up all our previous privilege logs, and we had
2 produced that on August 18th or 19th.

3 In the preparation of that privilege log, since
4 the common-interest issue and inadvertent production of
5 privilege documents was at issue, we went back and did a
6 comprehensive search; are there other potential
7 privileged documents that would have been produced
8 inadvertently.

9 And the -- as I mentioned, Your Honor, that
10 the -- that the main production was substantial in size,
11 we found that there were certain communications related
12 to another acquisition that Extreme had made, Avaya
13 Communications data center networking business. There
14 were essentially four e-mails, but because they were not
15 threaded to be one conversation, there were about 100
16 copies of those e-mails that were inadvertently
17 produced. But essentially there are just four unique
18 e-mails in response to which various communications
19 happened. But the genesis of the privilege claim was
20 basically four e-mails, and those four e-mails
21 essentially relate to two unique topics, and that's the
22 second claw back which numerically we admit seems pretty
23 large. It's about 100 e-mails, but it relates to four
24 different communications.

25 During this time we were also investigating the

1 issue of marketing documents that plaintiffs had raised,
2 and during the meet and confer process, for the first
3 time, plaintiffs identified which specific marketing
4 requests were at issue. And part of the confusion was
5 that for Extreme, which is a technology company,
6 marketing means different things. Some of it is
7 internal technical marketing and some of it is the more
8 business-style marketing where we advocate for our
9 products or sell them out in the market.

10 So there was some confusion about what
11 marketing documents are being talked about because we
12 had already produced marketing documents, e-mails from
13 custodians who were related to marketing. But we
14 understood what -- once we better understood what
15 plaintiffs were asking, we went back to Extreme, looked
16 at what was collected previously, and one of the
17 specific issues that plaintiffs had raised was that are
18 there shared repositories of documents that Extreme
19 maintains in the ordinary course of business.

20 And Extreme, Your Honor, is a company that has
21 come together, an amalgamation of different companies
22 over the years. So, things are not -- it's not a
23 monolithic company like Apple which has existed as a
24 single company for 30, 40 years. We've made multiple
25 acquisitions, some of which are Brocade or Avaya which

1 are in front of you.

2 So, the documents have been reorganized as
3 acquisitions have happened or as different people have
4 joined or the company structure has changed.

5 We went back. We looked. We identified a
6 shared repository. And this is what was happening
7 around the time that briefing was going on. So, one of
8 the persons who was actually responsible for that
9 repository, who had reorganized the documents, was on
10 leave. She came back. We quickly talked to her. She
11 identified the repositories. We went there, checked,
12 found the documents that were going to be responsive to
13 plaintiffs' request, and I think within a matter of
14 fortnight, we produced over 5,000 different marketing
15 documents that were previously not produced. And this
16 is within a month of plaintiffs raising this issue. We
17 made a full production of 5,000 documents on the
18 marketing side.

19 We also during this time produced the install
20 images that plaintiffs were asking for. We noted in our
21 brief that these are not helpful for plaintiffs. In
22 fact, Your Honor's previous order, Docket 131, had noted
23 that the production of source code would moot a lot of
24 these issues, and it was our belief that the install
25 images issue was moot because of that.

1 And I'll try not to get into argument, but I
2 just wanted to note that we produced over 400 different
3 install images from different Extreme products. Some of
4 those products date as far back as 2007 or 2006. So,
5 over 16 years of install images that we could find in
6 our archive, we produced that.

7 There was also an issue raised about a request
8 for network monitoring solutions. It was our belief and
9 we responded that in our discovery responses that,
10 number one, the monitoring solutions, which plaintiffs
11 admit are not an accused product in the case, are
12 irrelevant, so, we should not be required to produce
13 them. We also said that there are free monitoring
14 solutions that plaintiffs can download from the internet
15 and use it for their purpose.

16 Plaintiffs did not agree. They insisted that
17 we provide one. We did not want to come here, Your
18 Honor, today and take up your time arguing about whether
19 a certain solution works, not works. So, we agreed to
20 produce one monitoring solution. And we offered the
21 plaintiffs that; why don't we enter a stipulation which
22 reduces our burden of producing these monitoring
23 solutions and we can -- we can settle this dispute.

24 We have been trading drafts now for a couple of
25 months and unfortunately we have not been able to reach

1 an agreement. Plaintiff has its position; we have our
2 position. But ultimately we decided that this is not
3 where we want to spend the Court's time. So, this
4 morning, after consulting with our client, we have
5 agreed to produce whatever monitoring solutions we have.
6 We don't have to go back and forth on the -- on the
7 stipulation anymore. We'll get the software over to
8 plaintiffs in fairly short time. So that takes care
9 of -- from our side, at least, that takes care of one of
10 the other discovery disputes.

11 THE COURT: Okay.

12 MR. PRABHAKAR: There was another dispute about
13 production of source code printouts. As of today, there
14 are no pending requests for source code printouts. All
15 the source code that the defendant -- the plaintiffs
16 have requested, which is over 20-, 30,000 files in one
17 iteration, Extreme has produced that. We have produced
18 that in compliance with the protective order that was
19 entered by the Court.

20 Plaintiffs want us to not follow the protective
21 order. They have their reasons. Some of the reasons we
22 understand and we are willing to work with them on that,
23 but, so far, we're not -- we have not been able to reach
24 an agreement on that.

25 So, I can address that in the argument section

1 where the disputes are. You can also ask us to go back
2 and meet and confer just outside the courtroom. I'm
3 happy to do with that with Mr. Wood and see if we can
4 come to a resolution on that dispute. But, from our
5 perspective, Your Honor, this is where we stand.

6 There was also an issue about reforming our
7 interrogatory responses. We have committed that we will
8 do it. We regret that we haven't been able to do it at
9 the time frame that we had originally provided to
10 plaintiffs, but we have been investigating a lot of
11 discovery issues that plaintiffs are raising which
12 shouldn't have been issues in the first place. But
13 without getting into argument, that's the reason that
14 the interrogatory response rollup is delayed. But we
15 have provided -- now that we have better certainty and
16 we have put many of the discovery issues behind us, we
17 have provided a date certain. We didn't want to eat
18 into our associates' Thanksgiving break, so we have
19 offered to do a rollup of our interrogatory responses by
20 December 5th. We're fairly confident of meeting that
21 date.

22 There are -- as we were supplementing some of
23 our interrogatory responses, we have already done that
24 for three of them, and we're fairly confident that we'll
25 be able to do that for the rest of the interrogatory

1 responses.

2 So, that's where we are, Your Honor, in terms
3 of status. And if you are -- if you have any questions
4 or something was not clear, I'm happy to answer that.

5 THE COURT: Okay. Thank you.

6 MR. PRABHAKAR: Thank you, Your Honor.

7 MR. WOOD: Good afternoon, Your Honor.

8 THE COURT: Good afternoon, Mr. Wood.

9 MR. WOOD: Your Honor, would you like me to
10 comment on the timeline of discovery as well, or just
11 talk about the discovery issues?

12 THE COURT: If you feel there are corrections
13 to be made to the timeline, if you could briefly address
14 that because I want to make sure I have an accurate
15 picture.

16 MR. WOOD: Okay.

17 THE COURT: But we do need to spend time
18 letting you present on the legal issues, but I do want
19 to make sure that factually I have things straight.

20 MR. WOOD: Okay. Yes, Your Honor.

21 So, we first issued discovery in December of
22 2020, and that discovery contained a request for
23 marketing documents, RFP 37. The parties -- nothing
24 happened on discovery, really, for the first year. If
25 you remember, there were multiple motions to compel

1 filed. We weren't making any progress. We finally, I
2 think -- I think we ended up having a hearing in the
3 spring of 2022. So, it took all of 2021. And then we
4 had a hearing in the spring of 2022, and Extreme was
5 ordered to fully respond by May 13th, 2022.

6 In that production, there were very few
7 marketing documents. We noted that, and then just so
8 there would be no confusion that the issue wasn't with
9 our requests, on June 6, 2022, we issued new RFPs, 71
10 through 78. So, it was really clear exactly what kind
11 of marketing documents we were requesting because we
12 wanted to make sure we got them all.

13 Extreme told us on July 6th that it would be
14 substantially complete by July 29th. We still didn't
15 have a lot of marketing documents. And in the -- in the
16 next couple of months is when we discovered that not
17 only was Extreme using the products, that SNMP software
18 in the SLX, VDX products, they were also using it in
19 their EXOS line and EOS line, which constituted 40-plus
20 additional products that we hadn't known about before.

21 And if you remember, Your Honor, we had a
22 hearing -- we had a hearing in December of last year
23 based on what the scope of our requests -- did it
24 encompass the EXOS or not, and I believe -- I believe
25 the ruling was that it did.

1 And we -- in advance of that, we issued an
2 additional set of duplicate RFPs just to make sure there
3 was no confusion that our RFPs indeed did cover EXOS.
4 So, we were trying to -- we had a hearing about it, and
5 we issued additional RFPs just to be doubly sure.

6 Again, Extreme still didn't produce the
7 marketing documents we were -- we were talking about.
8 We then had a pause where we mediated in January, and
9 when the mediation failed at the end of January for
10 Extreme, it was actually successful for Broadcom and
11 Brocade, we then renewed our requests, and Extreme said
12 they would be substantially complete May of this year.

13 And at the end of May, they said they needed
14 six more weeks. We asked for an assurance in June that
15 the marketing documents would be produced by July 15th,
16 and they responded they had already produced 16, and
17 those were all by a custodian, Robert Reason was his
18 name, an employee of Extreme.

19 So, Extreme finally produced additional
20 documents in July. We still didn't see the marketing
21 documents. We had additional meet and confers on that,
22 and some of those were listed in our paper. But Extreme
23 identified Robert Reason at that time. And we said,
24 well, we only have 16 documents. There are well over 40
25 products that are at issue here; surely there are more

1 than this many standalone doc- -- you know, marketing
2 documents.

3 So, we then raised the issue with the Court.
4 Extreme promised to produce by September 15th. They
5 then -- as counsel represented, they produced 4- to
6 5,000 marketing documents on September 15th. And
7 Mr. Reason was the custodian for 2,000 of those
8 documents.

9 I noted that counsel said there was a "she"
10 that they had to talk to -- this is the first I've heard
11 that it was a lady -- that identified the repository.
12 We don't have a female custodian that -- for the
13 marketing documents. We have Extreme in general and we
14 have Robert Reason. That's it. So -- but we can take
15 that -- I can take that up with counsel later if we're
16 actually missing a custodian and there was a lady in
17 there.

18 So, we've been working on getting the documents
19 we need for quite some time, which is why we raise this,
20 and we appreciate Your Honor taking it up.

21 Since we've had this hearing scheduled, we have
22 made substantial progress. They have produced a lot of
23 marketing documents, I think, in response to us raising
24 the issue with the Court.

25 And if Your Honor doesn't have any questions

1 about the schedule, I'd be happy to run through the ten
2 issues that we mentioned to the Court in our filing on
3 September 1st, and that is Exhibit -- Exhibit 3 to our
4 September 1st filing has the e-mail that lists those,
5 and it has our requests and Extreme's response to that
6 request.

7 So, we've already talked about the marketing
8 documents. Extreme is now representing that that is
9 complete. And it's hard for us -- with the substantial
10 number that they have provided, I mean, we don't have
11 any reason to challenge that.

12 Issue No. 2 is the production of install
13 images. Extreme has produced 380 install images. They
14 have represented that that -- those are all the install
15 images that they can find after a reasonably diligent
16 search. I think there are many more source code trees
17 than that that they produced, and there should be one
18 install image for each source code tree, but if
19 that -- that is all they can find and produce, then I
20 think they have satisfied that request.

21 Issue No. 3 is the production of their
22 monitoring solution. And counsel discussed that, and as
23 of a little over an hour ago, they have represented that
24 they will -- they will produce all relevant monitoring
25 solutions. For the last two months, we've been

1 discussing they only wanted to produce one. Today
2 they're now producing all of them, which we're fine
3 with. We would like a date certain for that production.
4 We think two weeks. And we would like to know which
5 ones they plan to produce. That would be our -- our
6 request, and then I think that would --

7 THE COURT: Well, let's pause --

8 MR. WOOD: Yes.

9 THE COURT: -- right here. So, what would be
10 your position on that if he's requesting a date certain
11 and some identification?

12 MR. PRABHAKAR: So, Your Honor, for the
13 monitoring solution --

14 THE COURT: Yes.

15 MR. PRABHAKAR: -- we have the software
16 identified, and we feel comfortable that -- we have one
17 that is ready for production now, and the other
18 solutions, we should be in a position to produce them
19 within two weeks.

20 THE COURT: Okay.

21 MR. PRABHAKAR: And I mention two weeks because
22 I have commitments, like, hearings coming up in a
23 different case. But if you want it sooner, Your Honor,
24 just let us know and we'll get to work and get it done.

25 THE COURT: I think the two weeks will be

1 sufficient. You said two weeks would be acceptable --

2 MR. WOOD: Yes.

3 THE COURT: -- and they have identified it.

4 And you said you already have one ready?

5 MR. PRABHAKAR: Yes, Your Honor.

6 THE COURT: And, so, then the second one in two
7 weeks.

8 MR. WOOD: If they could --

9 THE COURT: So, that should take care of that
10 issue.

11 MR. WOOD: If they could tell us what they are,
12 that would be helpful. They were previously promising
13 to produce the latest product. I would assume they're
14 doing that now if -- producing something else, we may
15 have some questions for them. But if we knew what
16 solutions they're now planning to produce, that would be
17 helpful in verifying the request.

18 THE COURT: Is that something you feel like you
19 could do? You said you have one ready. And can you
20 make any -- do you have any specific information as to
21 the second one?

22 MR. PRABHAKAR: I do, Your Honor.

23 THE COURT: Okay.

24 MR. PRABHAKAR: So, we are planning on
25 producing three monitoring solutions that Extreme has

1 offered. The first one we already had agreement on.
2 It's a product called ExtremeCloud IQ Site Engine.

3 THE COURT: Okay.

4 MR. PRABHAKAR: That's the one that's ready to
5 go. That's the stipulation that we have been
6 negotiating for the last several months because -- and
7 the stipulation issues are actually not related to the
8 software itself, but certain other conditions that
9 plaintiffs had because they said we're not producing the
10 monitoring solutions that they want. So, it had nothing
11 to do with the production part but ancillary terms
12 related to production of one monitoring solution.

13 The second monitoring solution, which Extreme
14 has available but is no longer sold or offered to
15 clients, is called Extreme Management Center.

16 THE COURT: And that you are no longer offering
17 to clients; is that what you said?

18 MR. PRABHAKAR: And we haven't -- yes, Your
19 Honor. And we haven't offered that for several years
20 now.

21 XIQ Site Engine, the product we offered to
22 produce, is the one that's currently on the market and
23 used by a few of our customers. It's not a very popular
24 product.

25 The third product is called NetSight, and that

1 is a product that has been deprecated even longer than
2 Extreme Management Center. I believe 2013 or 2014 was
3 the last time that product would have been offered.

4 So, these are the three that we have available,
5 Your Honor, and we're willing to produce. But if Your
6 Honor might allow me a brief moment, the reason we were
7 always negotiating on Site Engine was because there was
8 a different request that plaintiffs had which asked
9 Extreme to produce samples of its hardware. And as part
10 of that, we agreed to produce six switches, and Extreme
11 IQ's Site Engine would have supported all those
12 switches. So, therefore, the additional software, we
13 were only producing it because we did not want to bring
14 this dispute before the Court.

15 But, otherwise, it is still our position that
16 there are free software available on the market that a
17 vast majority of people use that plaintiff could have
18 used months ago to get going with whatever they were
19 trying to do.

20 So, we're producing it, but we want to note
21 that just XIQ Site Engine would do the job. It would be
22 rare for an actual customer to use more than one
23 monitoring solution.

24 The last thing I would note, and this is
25 something that plaintiffs have admitted to with us

1 during meet and confers, that the monitoring solution
2 itself is not an accused product. So, this isn't a
3 product that's going to be at issue in this case in
4 terms of the claims that the plaintiffs have.

5 And I only mention this, Your Honor, because we
6 are doing all we can to not have to come in front of you
7 arguing about versions of software. But we're producing
8 more than ordinarily we would offer to produce simply to
9 keep disputes outside of this court.

10 THE COURT: Okay. Thank you. So, he's
11 identified Cloud IQ that's ready, and then the other two
12 have been identified, Extreme Management Center and
13 NetSight --

14 MR. WOOD: Yes. I think that --

15 THE COURT: -- within --

16 MR. WOOD: I think that --

17 THE COURT: -- two weeks.

18 MR. WOOD: -- resolves it. I did -- my
19 co-counsel had a question if there was another version
20 of Cloud IQ that's relevant other than Site Engine.

21 MS. WEBER: The prior version of the Site
22 Engine, Cloud IQ.

23 MR. PRABHAKAR: Sorry, I -- I was consulting
24 with counsel. Can you say that again? I apologize.

25 MR. WOOD: Yeah, if there was another version

1 of Cloud IQ Site Engine or Cloud IQ that is relevant and
2 was offered prior to Site Engine.

3 THE COURT: So, is there a second Cloud IQ
4 version?

5 MR. PRABHAKAR: There would be older versions
6 of Site Engine, Your Honor, that Extreme would have
7 offered in the past. But, as Mr. Wood, who is a pretty
8 trained software engineer knows, bugs get fixed in the
9 older version. Something new would get added; something
10 would get taken out.

11 So, we are offering to produce whatever is in
12 the field today that we send to our customers because
13 that's been one of their requirements; that we don't
14 somehow build a software that's not sold to our
15 customers.

16 So, we are offering to produce the latest
17 version. I don't think the prior versions have
18 relevance to the extent that the monitoring solution has
19 any relevance to this case. We would -- we would be --
20 we would like the Court to order us to produce if the
21 Court orders us to produce the latest version only.

22 THE COURT: Okay. Well, let's start with that.
23 And then if you feel the older versions are relevant,
24 you all can meet and confer on that because I can't make
25 that call today. I have additional argument on that.

1 So --

2 MR. WOOD: Right.

3 THE COURT: -- let's just plan on what has been
4 set forth. So, it would be the current version of the
5 Cloud IQ that's ready to go, and then the other two in
6 two weeks.

7 MR. WOOD: If it -- okay. So, the current
8 version now and the other two in two weeks; is that --

9 THE COURT: Yes. And then if you feel the
10 older versions of Cloud IQ may be relevant, please have
11 a meet and confer and see if you can resolve it without
12 having to bring that back --

13 MR. WOOD: Okay.

14 THE COURT: -- in front of the Court.

15 MR. WOOD: Yes, Your Honor. That's great.

16 Okay. Issue No. 4 was the production of
17 devices in response to a request for inspection one. We
18 have received all those devices from Extreme. At this
19 point, we are still in the process of setting them up
20 and verifying that they work. But right now we
21 have -- we have no issue with No. 4.

22 No. 5 was the identification of shipment
23 numbers in response to Interrogatories 5 and 6. We did
24 receive an update that does that. We have identified,
25 we think, an issue with the numbers, and Extreme is

1 investigating that, and, so, our request would be that
2 we could get a supplement by November 17th.

3 THE COURT: If you're investigating that, do
4 you feel that you could get a supplement by November
5 17th?

6 MR. PRABHAKAR: Yes, Your Honor, November 17th,
7 we should be able to do a supplement.

8 THE COURT: Okay.

9 MR. PRABHAKAR: But I do want -- we're still
10 investigating this, but I want to alert the Court to the
11 possibility that the issues that plaintiffs have
12 identified may not require a supplement because the
13 products that they have identified that they believe are
14 not covered in the response may actually have been
15 excluded for justifiable reasons.

16 So, to the extent that there is a supplement
17 required, we assure Your Honor that it will be done by
18 November 17th. But if there is no supplement required,
19 we'll just explain to plaintiffs why no supplement is
20 required also by November 17th.

21 THE COURT: Okay.

22 MR. WOOD: Okay.

23 THE COURT: That sounds like that will resolve
24 that.

25 MR. WOOD: Yes. Thank you.

1 No. 6 was the production of all the customer
2 download information for EXOS and EOS. Extreme has
3 provided that and represented that it is complete.

4 THE COURT: Okay.

5 MR. WOOD: That's done.

6 No. -- issue No. 7 is -- that issue is still
7 open, unfortunately. That's the production of source
8 code printouts identified by SNMP's experts.

9 So, we agreed in the protective order with
10 Extreme and Broadcom/Brocade that if we found source
11 code that is actually owned by SNMP, they would produce
12 that without any limit. And Broadcom/Brocade and
13 Extreme did that on our prior code reviews.

14 The -- we negotiated with them because the
15 production was so -- we found so much source code that
16 was actually SNMP's that needed to be produced,
17 according to our agreement, we both agreed all those
18 files would be produced as natives so our expert can
19 more easily evaluate them; they can more easily produce
20 them. And Extreme has actually produced, by my count,
21 395,552 source code files natively.

22 Then, for reasons unknown to us, when our
23 expert went -- started reviewing the EXOS code and
24 requested a production in July, Extreme refused to
25 produce it at first and then would only produce it in

1 PDF.

2 The protective order does call for production
3 in PDF. They said the parties had agreed to do a native
4 production. So, we started discussing this with
5 Extreme. We never received an explanation on why they
6 changed positions; why -- we had an agreement. This was
7 working just fine, and for some reason in July, they
8 just said, we're not going to do it anymore; we don't
9 think this is the right way to do it and we don't have
10 to under the protective order.

11 Reminded them that it had been done before.
12 This is -- it's harder for them; it's harder for us.
13 They insisted on producing PDFs. Since PDFs are not
14 formatted correctly, in many instances, they are hard
15 for our expert to work with. They're hard to search.

16 So, we've requested that they produce native
17 files, and their response was, we will do it, but only
18 if we amend the protective order to say we can produce
19 as natives. We said that's fine. So, we started that
20 process, I think, on August 3rd, and we are still -- we
21 are still going. So --

22 THE COURT: And this is just on whether you add
23 that they can be produced in a native --

24 MR. WOOD: Right. So, we -- our understanding
25 was we were -- we were just going to amend the

1 protective order to say you could produce a native.
2 What we have gotten is a set of limitations on how we
3 can use those files and what we have to do with them
4 that would have further restricted our expert. And, so,
5 we weren't able to agree to that. We've been going back
6 and forth. The entire negotiation has been on producing
7 all of those files in native -- as natives.

8 Two days ago we got another version that
9 removed the restrictions but only agreed to produce
10 certain of the files as natives. So, after two months,
11 the paradigm completely switched. Still haven't gotten
12 an explanation on that.

13 We -- the parties produced native files all the
14 time in this litigation. So, any time a file is not
15 easily viewed in PDF format, we produce it as natives.
16 Excel files are produced as natives. Any other file
17 that's not easily converted to PDF is produced as a
18 native file so the parties can easily view it. That
19 hasn't been an issue.

20 And, like I said, we -- Brocade was happy to
21 produce as natives. Extreme was happy to do it. And
22 suddenly in July --

23 THE COURT: Something changed.

24 MR. WOOD: -- everything changed.

25 THE COURT: So, let me pause you right there

1 and see if I can get Mr. Prabhakar's input on --

2 MR. WOOD: Yes, okay.

3 THE COURT: -- that --

4 MR. WOOD: Yes.

5 THE COURT: -- and why that's changed.

6 MR. WOOD: Okay.

7 MR. NEUKOM: Just one second. May we indulge
8 the Court for just a 60-second consult --

9 THE COURT: Oh, certainly.

10 MR. NEUKOM: -- before we respond to the
11 Court's question?

12 THE COURT: Certainly. We'll pause for just a
13 moment.

14 (A brief recess was taken.)

15 MR. NEUKOM: Sorry. Let me -- if the Court
16 will forgive us -- musical chairs -- I wanted to address
17 this one with the possibility of a practical solution.

18 THE COURT: Okay.

19 MR. NEUKOM: There is a fair number of things
20 that my friend, Mr. Wood, said that we disagree with
21 factually, but rather than get into a he said/she said
22 or he said/he said, here is my practical proposal for
23 how to resolve this: The current protective order as
24 drafted and proposed to us by the other side of the
25 caption doesn't allow some of the production protocol

1 that's -- that was later honored by voluntary agreement
2 and now is in dispute.

3 I think what we're talking about right now most
4 practically is: There is agreement that there should be
5 an amendment to the protective order so that Extreme is
6 not in a position of violating the protective order, and
7 there is some disagreement about a handful of
8 limitations about what that change to the protective
9 order should look like.

10 From our side, for what it's worth, there is no
11 interest in being obstructionist. The interest is in
12 how do we accommodate SNMP's request while still
13 producing documents in a way that can be used, in a way
14 that can be used and pincited by the parties for easy
15 cross-reference and they can be used at trial.

16 If that just put the Court to sleep, that
17 wasn't my intention. Here is my practical proposal:
18 The specific limitations and debates about the
19 protective order modification have not been briefed to
20 the Court. What I suggest is, on this issue, the
21 parties, within five court days or less, make a joint
22 proposal to you with either, A, an agreed-upon,
23 modified, stipulated protective order, and hopefully
24 Mr. Wood and Mr. Prabhakar can come to some sort of
25 agreement on some of these, what I would call conditions

1 issues, or, B, if they can't, the way that I've usually
2 done this in the past, which I think is efficient for
3 the Court is -- right? -- 99 percent of that amended new
4 protective order is going to be agreed upon. There
5 might be one section where SNMP says we want this and
6 where we say we want this. And then each side can imbed
7 within it a paragraph or two explanation, I think with a
8 directive from the Court that a paragraph or two is
9 better than a page or two, of why they would like these
10 limitations to be present or not present in the amended
11 protective order.

12 In my experience, Your Honor, what that does
13 for the Court is: It gives you one filing which you
14 could look through with succinct argument and you can
15 sort of check a box and say, I'm going to allow this
16 limitation or not.

17 Alternatively, I can turn the podium back to
18 Mr. Prabhakar and we can start to debate what the
19 limitations are or the reasonableness thereof. But I
20 think if we do that, we're going to be getting into some
21 pretty wonky source code debates for the first time in
22 this case, and I think we can do that more efficiently
23 for the Court.

24 THE COURT: And the main reason for being here
25 today is: We're supposed to get to these e-mails. And,

1 so, a lot of this, of what I'm hearing up until this
2 point, certainly could have been dealt with and let me
3 know it's been resolved and we wouldn't have had to have
4 spent a whole hour now on it.

5 MR. NEUKOM: Yes.

6 THE COURT: So, I'm inclined to go with that
7 proposal, just to let you all have five more days to see
8 if you can work through any amendments to the protective
9 order. If you can't, all I want is a joint document,
10 and with the -- if there is disagreement on the
11 paragraph as you set forth, that's perfectly fine, but I
12 want the positions all stated within that one document.
13 And I don't want there to be anything outside the agreed
14 protective order to review either, just the comments
15 within the protective order itself.

16 MR. WOOD: Okay. Yes, Your Honor.

17 MR. NEUKOM: E-mailed to chambers, Your Honor?

18 THE COURT: Yes, sir. Thank you.

19 MR. WOOD: And the rest are very -- very quick.

20 Extreme has supplemented their financials as we
21 asked. They have provided a privilege log for
22 production No. 20, and counsel has already addressed,
23 said that they will do their consolidated rog responses
24 by December 5th, and we are fine with that date.

25 THE COURT: Okay.

1 MR. WOOD: So, thank you, Your Honor. This has
2 been very helpful in resolving some of these issues.
3 So, thank you.

4 THE COURT: Okay. Thank you.

5 Just one moment. Let me take -- let me take a
6 brief recess and see if there is -- and then we'll come
7 back. We'll take a five-minute recess.

8 THE COURTROOM DEPUTY: All rise. This
9 honorable court stands in recess.

10 (A brief recess was taken.)

11 THE COURTROOM DEPUTY: All rise. This court is
12 again in session. Please come to order and be seated.

13 THE COURT: Now we'll get to the issue of the
14 e-mails. So, as I understand, Mr. Wood, you can go
15 ahead and come to the podium to present your position or
16 answer questions.

17 MS. WEBER: It would be me, today, Your Honor.

18 THE COURT: Sorry, Ms. Weber.

19 MS. WEBER: That's okay.

20 THE COURT: So, we have the 13 e-mail chains at
21 issue with what I understand the core e-mail is one
22 dated September the 26th of 2017, which were about two
23 Brocade employees.

24 MS. WEBER: Yes.

25 THE COURT: So, let me start this as we sort

1 through the legal issues. It doesn't appear that there
2 is any dispute that these would be attorney/client
3 privilege. But you're going to be arguing for reasons
4 that that was waived; is that correct?

5 MS. WEBER: That's correct. Waived by Brocade.
6 And, then, also, that there is no common-interest
7 privilege.

8 THE COURT: Okay.

9 MS. WEBER: And one clarifying point: There
10 were 13 e-mails, and then there were an additional nine
11 documents that were clawed back later. So, now it's 22
12 e-mails total or Bates-numbered documents.

13 May I begin, Your Honor, or did you have a
14 question?

15 THE COURT: Yes, you may begin. Thank you.

16 MS. WEBER: Good afternoon. May it please the
17 Court.

18 I'm going to discuss the two issues today
19 related to the e-mails. First, I'll be discussing why
20 the 22 e-mails between Brocade and Extreme should be
21 produced to plaintiffs in unredacted form. And the
22 second overarching issue that I'll discuss is Extreme's
23 improper asserted -- assertion of privilege over roughly
24 100 Bates-numbered documents with a third party called
25 Avaya and another third party called Lexoft.

1 As to the Brocade and Extreme privilege issue,
2 Extreme has taken a sweeping approach in purporting to
3 assert attorney/client privilege over communications
4 with third parties, and that's become apparent now that
5 there are three separate third parties that Extreme is
6 trying to shield with the -- with attorney/client
7 privilege. And our view is that this approach
8 improperly broadens the scope of attorney/client
9 privilege when the law is clear that it should be
10 construed narrowly.

11 It is defendant's burden to justify the
12 assertion of privilege. That's *Doe v. Hamilton*. And
13 defendants haven't remotely begun to carry their burden.

14 There is two independent reasons why the
15 Brocade and Extreme e-mail communications listed in
16 Extreme's privilege log should be produced to plaintiffs
17 in an unredacted form, and the first reason is that
18 Brocade has waived any claim of privilege it may have
19 had over the, as you mentioned, September 26, 2017,
20 e-mails between two Brocade employees, Mr. Fitterer and
21 Mr. Parsons. Those are in 11, anchored in the bottom of
22 11 of the 22 chains.

23 Of the 11 redacted documents containing this
24 communication, Brocade did not include any of them on
25 the privilege log that it served to us over a year ago

1 in September of 2022. And Brocade did not include them
2 on this log; although, two months just prior to that,
3 Extreme had produced many documents, Bates-numbered
4 documents, containing this exact correspondence between
5 Mr. Fitterer and Mr. Parson -- Parsons.

6 We met and conferred with Brocade over this
7 issue in August, and its counsel at the time claimed
8 that they did not have the correspondence because it was
9 missing and Mr. Fitterer may have deleted the e-mails.

10 In its briefing, Brocade has continued to make
11 that claim. It's our position that that doesn't help
12 Brocade. The general rule is that if you do not log
13 communication on a privilege log, the privilege over
14 that is waived.

15 And we have a case that Extreme actually cites
16 for the assertion that Brocade had no duty to log this
17 e-mail. It's a Southern District of New York case,
18 *Weber v. Paduano*. It's where a tenant sought to recover
19 damages from an apartment fire below her from another
20 tenant. In that case, the Court observed that the
21 defendant tenant who had started the apartment fire did
22 not have to log documents that were not ever in their
23 control. Those were third-party documents from fire
24 investigators that the tenant had never had.

25 But Brocade's own internal e-mail was at one

1 point in its own control, and it became available to it
2 again when the documents were produced in July of 2022
3 by Brocade.

4 That same court in the *Weber v. Paduano* case
5 also approvingly observed that the defendant tenant did
6 actually log third-party documents for a third party who
7 was involved in the defense of the action, and that was
8 defendant's insurance company. And, similarly, here,
9 Brocade's own co-defendant did produce this internal
10 e-mail between the two Brocade employees.

11 And, so, our position is that even under
12 Extreme's own authority, Brocade did have the duty to
13 log it once it became available to it again, and it did
14 not do so, and, so, it waived the privilege, and that
15 comports with the general rule that failure to log
16 waives the privilege. And that's the first independent
17 reason for ordering production of the 22 Brocade and
18 Extreme communications in our Appendix C.

19 The second independent reason is that Extreme
20 has not carried its burden to demonstrate that a
21 common-interest privilege exists. As the party
22 asserting the common-interest privilege, Extreme has to
23 not only prove an underlying, unwaived privilege, it has
24 to also prove that the otherwise privileged information
25 was disclosed due to actual or potential litigation and

1 was made for purpose of furthering that actual or
2 potential litigation. And we cited three cases in
3 support of that; *Adkisson*, *Gammons* and *Boyd*.

4 *Adkisson* is a case that Extreme actually
5 originally cited. It does use -- it's a diversity
6 action. It cites Tennessee law, as Extreme pointed out
7 in response, but it also notes that -- the parties had
8 briefed the issue, and it appeared that federal common
9 law is in accordance with the Tennessee privilege law on
10 this common-interest issue, and it did require actual or
11 potential litigation.

12 You're familiar with your decision, obviously,
13 in *Gammons*. There you observed -- it was unclear how
14 communications would have been disclosed due to
15 anticipated litigation against the litigant.

16 And *Boyd* stands for the same proposition. It
17 is a Tennessee state court case, but it cited all
18 federal cases in support of this actual or potential
19 litigation requirement.

20 And several -- as we noted in the briefing -- I
21 won't repeat it, but several of Extreme's own cited
22 cases also involved actual or potential litigation.

23 But, regardless, we believe the Court need not
24 actually even decide whether actual or intended or
25 potential litigation is necessary because it's clear

1 that a mere commercial interest is insufficient to give
2 rise to the common-interest privilege. Common interest,
3 under the *Libbey* case and others, requires a common
4 legal as opposed to commercial interest.

5 In its response brief, Extreme argued that
6 *Libbey* is inapposite -- that's a trade dress case -- and
7 they said that the defendant, Oneida, is the only one
8 that involved an attorney; that it took no steps to
9 ensure that its documents with a third party about
10 potential supplier relationship and infringement would
11 remain confidential, they took no steps to do that, and
12 that Oneida shared the privileged communications with
13 the third party simply for commercial gain and not legal
14 advantage.

15 But if you look at the decision at 349, the
16 Court ruled that even if the parties had taken steps to
17 preserve the confidentiality of those documents shared
18 with third parties, like Brocade and Extreme did in this
19 case, the Court ruled the correspondence was still,
20 quote, "ancillary to the principal activity in which
21 Oneida and the third parties were engaged."

22 And I quote, "The negotiation of an agreement
23 for third party to make and for Oneida to buy and
24 distribute glassware, all parties apprehended that their
25 venture involved some legal risk, but that apprehension

1 was merely a part of their larger endeavor."

2 And we think that's on point with what happened
3 here with the sale between Brocade of its data center to
4 Extreme, and that any percolating legal interests were
5 just one part of the larger endeavor of getting the sale
6 over the finish line.

7 So, Extreme is trying to broaden its invocation
8 of privilege, invoke a business interest, its purchase
9 of Brocade's assets, and then try to ground common
10 interest in that. But it hasn't identified an agreement
11 to jointly analyze a common legal interest between the
12 parties.

13 I'll run through this briefly, but we asked
14 Extreme to identify that agreement. It identified a
15 confidentiality agreement with boilerplate language that
16 actually does even reference a potential joint defense
17 agreement, but it says nothing about a common-interest
18 agreement.

19 It also identified an asset purchase agreement,
20 but also just goes through what types of information the
21 parties are going to exchange to, I guess, get the deal
22 over the finish line and the steps they're going to take
23 to get there. But neither one of the agreements
24 reflects anything other than that common business
25 interest of getting the asset sale finished. There is

1 no discussion of a common legal issue that the parties
2 were going to jointly analyze, let alone a discussion of
3 a common legal issue that's associated with actual or
4 anticipated litigation.

5 Extreme argued in its response brief that
6 Extreme and Brocade had, quote, "related and relatively
7 narrow set of common legal interests, including a mutual
8 understanding of the licensing rights that were
9 associated with the business assets that were being
10 purchased and transferred to Extreme."

11 But those assertions are nothing more than
12 attorney argument, and it ignores that the only
13 agreement that Extreme has ever cited or invoked is a
14 confidentiality agreement with boilerplate language and
15 the asset confidentiality with boilerplate language and
16 the asset purchase agreement.

17 Brocade and Broadcom are sophisticated
18 entities, have big law firms representing
19 it -- representing them. If they wanted to ink a
20 common-interest agreement to reflect joint legal
21 analysis of the common legal purpose, they could have
22 done so and they didn't.

23 THE COURT: Is that your position; that they
24 would have had to have had a written agreement?

25 MS. WEBER: No, I don't think that they would

1 have had to have had a written agreement. I think that
2 takes it a bit too far. But I think the fact that they
3 did have a written agreement and there is nothing about
4 it in there speaks volumes.

5 And I think Extreme's -- what Extreme is
6 inviting the Court to do would sweep in almost any
7 correspondence that arises in a complicated transaction
8 such as theirs. There is -- those type of transactions,
9 I think, invariably give rise to all types of legal
10 issues about the scope of what's being sold, and I don't
11 think it's the goal of the law to protect all of those
12 communications under the guise of an asset sale.

13 And, lastly, I'll just note to remember that
14 Brocade did not want to assert a common-interest
15 privilege with Extreme a single time in its 90-page
16 privilege log that it and Broadcom jointly produced, and
17 Extreme did not want to assert the common-interest
18 privilege with Brocade until after we met and conferred
19 with them for months and we told them we are going to
20 move the Court.

21 Does Your Honor have any questions on this
22 issue?

23 THE COURT: I do question whether -- I didn't
24 hear you reference this, but in your position statement,
25 another argument you were making that they had waived

1 was for the untimely production of the privilege log.

2 Are you still standing on that as well?

3 MS. WEBER: Yes. Well, Brocade in particular,
4 I think that's just one factor to analyze in whether it
5 waived the privilege. And it did take -- I guess it
6 produced it in September of 2022. It was ordered to
7 fully respond to the discovery request by May 15th. So,
8 I think that that's one factor to consider and lean
9 towards -- leans towards a finding that they did waive
10 the privilege by failing to log it and the delay they
11 took in finally getting that log to us.

12 THE COURT: Okay.

13 MS. WEBER: All right. I'd like to turn to the
14 second major issue, which is the Avaya and Extreme
15 documents. Extreme has claimed privilege over more
16 third-party communications. This time it's with -- two
17 third parties named Avaya and Luxoft. I have two cases
18 that I'm going to reference today. They're in reply to
19 some arguments that Extreme made in a response which was
20 submitted a week after our opening, and I have copies
21 for Extreme and the Court when I raise them.

22 So, just after the briefing on this first
23 motion was completed, there were two successive claw
24 backs and that's where the additional Brocade/Extreme
25 e-mails were clawed back. But then there were also this

1 new category of Extreme communications with the third
2 party, Avaya.

3 We wanted the Court to ideally hear all of
4 these same common interest issues at the same time.
5 During the meet and confer process, Extreme did claim
6 that its communications with Avaya were protected under
7 the common-interest privilege. And when we asked
8 Extreme to confirm what agreement was anchoring that
9 claim of privilege, it said it would look for it and get
10 that to us in the upcoming days.

11 And after we raised this issue with the Court,
12 we learned Extreme's new position was that the transfer
13 of privilege had actually occurred from Avaya to
14 Extreme. And it also asserted that other communications
15 between Avaya and Extreme employees, non-attorneys, were
16 privileged because Avaya was acting as Extreme's agent.
17 So, I will address those two issues. And I'll address
18 the claimed transfer of privilege first.

19 In 2017, Avaya was going through a bankruptcy
20 and it sold some of its assets to Extreme. It
21 was -- I'll be clear -- an asset sale of one part of
22 Avaya to Extreme and sub- -- under these, I guess,
23 roughly 100 Bates-numbered documents, there is only one
24 attorney/client communication in all of them, and that's
25 a communication between Avaya and its in-house counsel,

1 Richard Hamilton, III.

2 We cited authority, which was the *Linx* case,
3 and it holds that disclosure of an attorney/client
4 privilege communication from a seller to a buyer in an
5 asset sale is a waiver of that privilege. And, so, we
6 agree with that. Avaya's disclosure of its attorney's
7 internal analysis relating to a sale and Avaya's
8 disclosure of that to Extreme was a waiver. That
9 follows *Linx*.

10 Extreme, I think, has also acknowledged that
11 this sale of assets is not enough to transfer a
12 privilege from the selling corporation to the receiving
13 corporation, and it argues in its brief that the
14 transfer of control of the company does warrant the
15 transfer of privilege.

16 So, I have a couple of responses to that.
17 First, it's Extreme's burden to document that -- I
18 guess, to prove privilege, and, again, it's construed
19 narrowly so that the fact-finding process is not
20 frustrated. And Extreme here has not remotely shown
21 that the transfer of Avaya as a corporation transferred
22 to Extreme.

23 Avaya in 2017 to 2023 is a public company. It
24 still exists. The transfer of control did not happen,
25 and Extreme has not proven that it has happened.

1 Extreme purchased a division of Avaya assets. It did
2 not purchase the entire company.

3 And the case that I have, I think it's a pretty
4 basic assertion, but I do have copies for Extreme if
5 they want them. It's *Commodity Futures Trading Co. v.*
6 *Weintraub*.

7 Would you like a copy, Your Honor?

8 THE COURT: Yes.

9 MS. WEBER: I could approach the bench if you
10 need it.

11 And this is -- let's see -- 417 U.S. 343, and
12 it just stands for the basic proposition that the right
13 to assert or to waive a corporation's attorney/client
14 privilege is an incident of control of the corporation.
15 So, if control changes hands, then the right to transfer
16 privilege also changes hands. I think that is the
17 anchor behind the cases it cites, anyway.

18 So, Avaya still exists today. Its attorney,
19 Richard Hamilton, III, stayed with Avaya. He didn't go
20 to Extreme. And Avaya simply sold off one of its
21 business divisions.

22 So, our position is that Extreme has not
23 carried its burden to show that the transfer
24 or -- sorry -- the privilege transferred to Avaya to
25 Extreme.

1 Second, and just as important, there is another
2 case that I think that the principle it stands for is
3 commonsensical. *American International Specialty Lines*,
4 240 F.R.D. 401. It's a Northern District of Illinois
5 case.

6 May I approach the bench?

7 THE COURT: Yes, you may.

8 MS. WEBER: So, this case shows that courts are
9 loathed to split the privilege amongst multiple
10 entities. In this *American Specialty Lines* case, the
11 Court rejected an invitation to divide up the
12 attorney/client privilege based on assets received from
13 a bankruptcy sale, and it held that absent control of
14 the corporation itself, the Court found that the
15 attorney/client privilege would not pass to a successor
16 entity, even with respect to the assets that transferred
17 to that successor.

18 So, it does come down to control, which I don't
19 think Extreme has proven, or has even come close to
20 showing. Again, we have a division of assets.

21 In addition, the *Linx* case that we cited holds
22 that the privilege can only be asserted by Avaya and not
23 Extreme. Avaya is not here today. I think, noticeably,
24 Extreme invited Brocade to participate; did not invite
25 Avaya to participate. It's still a company that exists.

1 It hasn't made a statement about this. And I think that
2 all goes to Extreme's burden and failure to carry it.
3 So that goes all to one e-mail between Avaya and its
4 attorney.

5 The rest of the e-mails that Extreme is
6 withholding, all of them are between Extreme employees
7 and Avaya and Luxoft employees. None of them are
8 lawyers. And, so, to keep these out of evidence, the
9 argument is that the Avaya employees were acting as
10 Extreme's agent and, at bottom, the agency argument
11 isn't applicable. It only applies if there is
12 attorney/client privilege on that underlying e-mail
13 which we believe there is no privilege. It was waived
14 when Avaya disclosed it.

15 But, also, we believe that Extreme is wrong as
16 a legal matter; that Avaya was somehow acting as an
17 agent in connection with the privilege or work product
18 communications.

19 The privilege -- we cited the *Hosea Project*
20 *Movers* case that says the privilege only extends to
21 agents of a lawyer who are employed to provide legal
22 advice. I think one of Extreme's cases backs that up.
23 This is the *Cooey v. Strickland* case out of the Southern
24 District of Ohio. There it observed that privilege
25 includes all the persons who act as the attorney's

1 agents, like secretaries, file clerks, telephone
2 operators, messengers, etcetera, and I think that fits
3 perfectly with the idea in *Hosea* that privilege only
4 extends to agents of lawyers who are employed to provide
5 legal advice. And I don't think there is any reasonable
6 argument that Avaya was employed to provide legal advice
7 on behalf of a lawyer for Extreme.

8 So, Extreme's agency argument not only fails to
9 track the case law, but I think it also fails to track
10 how the agreements that they've pointed to define
11 Avaya's agency role.

12 So, the only agency agreements that Extreme
13 invokes set forth a, quote, "limited agency," end quote.
14 And this expressly carved out the sharing of information
15 that would result in the disclosure of privilege.
16 That's Exhibits 12 and Exhibit 13.

17 In these limited agency agreements, the work
18 was also defined only to include things like processing
19 orders, invoicing, delivering product. And, so,
20 it's -- I think it's clear just from looking at the
21 papers that Avaya's contemplated agent role was just
22 helping smooth over the transition of the sale of one
23 part of Avaya to Extreme.

24 Extreme also invoked the asset purchase
25 agreement, but if you take a look at that, it makes

1 clear in Section 5.02(c) that this particular sale did
2 not obligate either party to waive privilege. I think
3 that's a common -- common term. And it also made clear
4 that each party had to use commercially-reasonable
5 efforts, including by entering into a joint defense or
6 common-interest agreement to permit the disclosure of
7 privileged information. And Extreme and Avaya have not,
8 to our knowledge, ever entered into any such agreement
9 and Extreme did not identify one to us.

10 So, the disclosure of the internal Avaya e-mail
11 between Avaya and its attorney, Richard Hamilton, III,
12 constituted a waiver of the attorney/client privilege.
13 And Extreme has articulated no reason, we believe, why
14 any of the other non-attorney communications between
15 Extreme and two third parties would be subject to any
16 claim of privilege or work product.

17 That's all I have on those two issues. But I
18 can answer any question on this second one that you
19 have.

20 THE COURT: Okay.

21 MS. WEBER: Okay. Thank you, Your Honor.

22 THE COURT: Before you sit down, Ms. Weber, so,
23 I want to go back to, I guess, the three documents you
24 said Extreme for the first time had argued that it had
25 inadvertently produced documents ending in 693, 891 and

1 860. And then they had pointed out that they had
2 referenced those in a sworn interrogatory response.
3 Then 30 days later, those were subject, I guess, to the
4 claw back.

5 So, I guess my question with regard to that, as
6 brought up, whether 502(a) comes into play if there has
7 been an intentional disclosure. If there has, then do
8 we need to look at whether there is the same subject
9 matter; do we need to look at the fairness argument?
10 And, so, I just wanted to raise that question while I
11 had you all here today.

12 MS. WEBER: I appreciate it, Your Honor.

13 I think that -- well, I know we're not making
14 an inadvertent disclosure argument. We -- we've noted
15 that it appears that they have selectivity waived, and
16 based on their intentional citation of three documents
17 pursuant to Rule 33(d) and their disclosure of a letter
18 between -- I think it was Brocade and Broadcom to
19 Extreme stating that the SNMP Research license was not
20 assignable, that's also legal analysis pertaining to
21 SNMP Research that has now been disclosed. And it
22 sounds like that type of contract analysis is also the
23 type of analysis underlying other clawed-back
24 communications based on Extreme's description in the
25 briefing.

1 We'd certainly be happy to brief for Your Honor
2 further whether subject matter waiver is warranted, but
3 I think, at least to the license -- or, sorry; excuse
4 me -- legal analysis regarding the scope of the SNMP
5 license and whether it's assignable, we would -- we do
6 believe that that's been selectively disclosed and the
7 rest should be produced.

8 THE COURT: Okay.

9 MS. WEBER: Thank you.

10 MR. NEUKOM: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. NEUKOM: I do have a few remarks to share
13 before I -- and I can open myself up to questions at the
14 beginning or at the end. Does the Court have a
15 preference?

16 THE COURT: I have my questions, but if you
17 want to go ahead and state your position, that's fine as
18 well.

19 MR. NEUKOM: Okay. I'll try to be brief.

20 As an initial matter, I'd like to provide the
21 Court just a little bit of factual background on this
22 issue, including the claw-back issue, and, more broadly,
23 the disputes that the Court has heard about today.

24 This Court has dealt with an awful lot of
25 discovery dealings in this case going back a couple of

1 years. There are a couple of different reasons that
2 could be the case. One is a recalcitrant or an
3 obstructionist defendant or, in any event, a party who
4 is not producing materials. Another could be an
5 overeager propounding party that is increasing the
6 burden.

7 I'm not going to try to convince you that one
8 party or another here is being a good actor or a bad
9 actor, but I do want to give the Court some background
10 about what's happening beyond the Court's gaze.

11 At this point, by my count, SNM- -- pardon
12 me -- Extreme has received and responded to about 200
13 requests for production of documents. We have produced
14 1.4 -- I'm using round numbers -- 1.4 million pages of
15 documents. That's not counting the over 500,000
16 additional pages of source code printouts which have
17 been demanded of us over source code for over 100
18 different versions which cannot even be measured in a
19 page count. We've seen eight motions to compel from the
20 plaintiff, and by our informal internal survey, we have
21 had 37 or more meet and confers in this case.

22 We are happy to argue to the heavens and take
23 our wins and losses on discovery disputes, but I just
24 want to be sure that this Court understands that what we
25 have here is not a situation of difficulty or

1 recalcitrance. What we have here is an unusually,
2 unusually high burden of discovery requests. And the
3 report card will show what it does, but we are trying
4 our darnedest.

5 A final footnote on that relating to the
6 monitoring solution issues, I heard from Mr. Wood a few
7 times that we've agreed to produce all relevant versions
8 of the monitoring solutions. That's not quite right.
9 We are agreeing to produce those three monitoring
10 solutions that my colleague mentioned today.

11 That is without a concession -- not that I'm
12 trying to preserve the point, but I just want to be
13 straight with this Court about what matters and doesn't
14 in this case -- that is without conceding that there is
15 any relevance to those monitoring solutions.

16 In fact, we are concerned that the older
17 monitoring solutions are not even going to work; that
18 for opening them up would be like opening up a
19 15-year-old Excel file which has call links to web pages
20 that no longer exist.

21 THE COURT: That's something you all are going
22 to meet and confer on; correct?

23 MR. NEUKOM: I assure you that we --

24 THE COURT: I really want to get --

25 MR. NEUKOM: -- will be asked to.

1 THE COURT: -- to the issues we're here about
2 today because it's 3 o'clock and we need to end at 4:00
3 and I'm afraid I'm not going to be able to hear
4 everything. So --

5 MR. NEUKOM: Fair enough. I'll move on.

6 THE COURT: -- we'll have to come back.

7 MR. NEUKOM: Thank you, Your Honor.

8 THE COURT: So, we'll start with what would
9 be -- what's your position on plaintiffs' point that
10 Brocade did not waive the privilege by not logging it?

11 MR. NEUKOM: So, on the Brocade waiver, I think
12 the facts here matter. Number one, for these -- call
13 them 13 e-mails at issue, as far as we understand,
14 Brocade didn't have them in their files, and you can't
15 produce what you don't have. We did have them.

16 THE COURT: Well, let me ask you about this,
17 and I know you represent Extreme, but -- so, plaintiffs
18 have said they received e-mails -- I guess
19 Mr. Fritterer, if I'm pronouncing his name correctly --
20 that those predated and postdated the date of this court
21 e-mail. So, I'm trying to understand why it would not
22 have been available to log.

23 MR. NEUKOM: Look, I would have to defer to
24 Ms. Plessman on that issue. Although, I haven't -- I've
25 heard suspicions, but I've heard no accusation of any

1 spoliation or any untoward conduct by Brocade and
2 Broadcom. As Your Honor noted, I don't represent them.
3 I do take them at their word that they simply didn't
4 have these documents.

5 If SNMP wants to make an accusation and seek
6 relief under the theory that Broadcom/Brocade, in fact,
7 contrary to what their counsel of record and a member of
8 this gild has said, did have those documents and, yeah,
9 withheld them, I would leave that to SNMPR to pursue in
10 some different procedural format other than today.

11 From my perspective as counsel for Extreme,
12 when I hear that Broadcom/Brocade says they didn't have
13 those documents, I take that to be -- I take that
14 representation as truthful.

15 THE COURT: Okay. So, Extreme noted the
16 communications, and that was in, I believe, July --

17 MR. NEUKOM: So, we did have --

18 THE COURT: -- is that correct?

19 MR. NEUKOM: I'm so sorry. I didn't mean to
20 talk over you.

21 THE COURT: No. So, I'm just getting to the --
22 I'm trying to -- I'm going to have to -- I'm trying to
23 address all of the points that they're making of waiver
24 and I want to get your position on those.

25 So, first was not logging it. You don't

1 specifically have a position on that. It sounds like
2 you're taking them at their word that they would not
3 have had it and that's the reason that they didn't log
4 it. But I'm having to look at the legal issue of would
5 that be a waiver. So, you can either state your
6 position on that, if you have one, or --

7 MR. NEUKOM: Sure. My position would be as
8 follows: If we -- if we accept the representations that
9 Broadcom did not have these documents to produce, then
10 the fact of what happened here is as follows: We did
11 have them; we produced them in redacted form because
12 there were certainly some dealings between these parties
13 which were not privileged and others that were, and I
14 think that's important to understand by way of
15 background.

16 But we produced redacted versions.
17 Broadcom/Brocade, by my lights, and I believe under the
18 law, was under no obligation to provide a privilege log
19 for something which was produced by another party.

20 We produced it. We redacted it. We then noted
21 these items on our privilege log. I think there is a
22 dispute about whether we should have not only logged
23 them, but furthermore in the log noted this is also
24 covered by a common-interest agreement. The law says
25 that is not required by any stretch. We've got the DC

1 *Comics* case, the *Zurich* case, the *Kamatani* case.

2 So, look, we -- I may seem less confident at
3 the podium when we talk about Avaya and the claw back,
4 but as to the Broadcom/Brocade 13 e-mails, in the first
5 instance when they were produced, they were redacted.
6 We privilege logged them when we produced our privilege
7 log. There is now later a dispute about should we have
8 additionally tagged it as common interest or should a
9 different party, non-party now, have additionally logged
10 it.

11 I am aware of no authority under the law which
12 imposes on Broadcom/Brocade a logging obligation for a
13 document produced by another.

14 Now, I can imagine a different scenario. If we
15 had produced a Broadcom/Brocade privileged, common
16 interest or otherwise, document and it hadn't been
17 redacted and at that point we got into sort of a
18 snapback scenario, look, whether they had a duty to or
19 not, I could certainly imagine that Broadcom and Brocade
20 would want to raise their hand.

21 But, in this instance, if I -- if I'm being
22 asked to put myself in Ms. Plessman's shoes, I can't
23 imagine what the duty or what the practical need would
24 be to say anything because the privilege materials at
25 issue had been redacted and weren't being produced.

1 THE COURT: Okay.

2 MR. NEUKOM: I said a moment ago -- let me -- I
3 know the Court wants to get to the very specific issues,
4 but I just want to set the table in a way which I hope
5 is useful.

6 In February 2017, my client and Brocade
7 executed an agreement which included confidentiality
8 clauses and which commemorated contractually the
9 commonality of interest between the two. Thereafter,
10 the parties negotiated and worked on and ended up
11 executing a purchase and sale agreement for a division.

12 The 13 e-mails at issue arose here in a very
13 specific circumstance. By the time this happened, and
14 this goes to a distinction from the *Libbey* case and a
15 few others, by September of 2017, Extreme and Brocade
16 had agreed upon all terms of this transaction. Unlike
17 *Libbey*, unlike an awkward position that we're all used
18 to seeing when you have a commonality of interest
19 between two parties who are negotiating a deal, are they
20 commonality of interest because they both want the deal
21 to get done, or are they adversaries because each one
22 wants a respectively better term?

23 That was not the scenario here. By September
24 of 2017, there is an e-mail correspondence between, on
25 one hand, Mr. Wood, longtime outside counsel to SNMPR,

1 and on the other hand, two attorneys, one for Extreme,
2 one for Brocade.

3 That e-mail is not privileged, and it's been
4 provided to the Court as one of the exhibits. The gist
5 of that e-mail was, hey, SNMP, will you agree to
6 transfer the license agreement which previously went to
7 Brocade over to Extreme? SNMPR said, in effect, no.
8 Or, in any event, what came out of that e-mail
9 communication was there was not an agreed-upon transfer
10 of the license.

11 Those two attorneys representing two companies
12 who at that point are contractually agreed upon the
13 terms of a transfer of the business, what spins out from
14 that is some e-mail traffic and some discussions between
15 attorneys and between attorneys and their clients, which
16 communications all happen while governed by -- it's not
17 disputed -- confidentiality obligations.

18 The reason that I say that that background
19 matters is: To me, it goes to one of the points that we
20 just heard at the podium which was, here we have a
21 commonality of business interest but we don't have a
22 commonality of legal interests.

23 To me, that's a hard argument to countenance
24 when you understand what the subject matter was of the
25 correspondence in particular; namely, you were talking

1 about IP rights, licensee rights, contract rights in
2 which Brocade and Extreme, attorneys for the same
3 explicitly on the e-mail chain, are wanting one result.
4 Mr. Wood for SNMP on the other hand doesn't yield, and
5 then there is legal analysis and legal subject matter
6 communication that follows, on which subject matter
7 these two companies, being bound by the fully
8 agreed-upon terms of a contract, had a commonality of
9 legal interest.

10 Next point, and I'm going to cover this very,
11 very briefly. We heard the argument again that there
12 needs to be an actual or potential anticipation of
13 litigation. Humbly, I think that's a relatively easy
14 question to decide. There is no dispute between the
15 parties that federal common law governs this issue.

16 If we look to the federal case law on this
17 issue, *Dura Global*, *Elvis Presley*, *Fresenius*, *William F.*
18 *Shea*, *MPT*, *BDO Seidman*, *Regents of California*, I believe
19 I have just bored the Court with about half of the case
20 law citations that we've provided for you showing that
21 the great weight of authority is that there -- under
22 federal law as opposed to Tennessee law, there is no
23 need for an anticipation of litigation.

24 And if that proposition is wrong, then the
25 Federal Circuit Court of Appeals is wrong, the Seventh

1 Circuit Court of Appeals is wrong, and a heavy handful
2 of District Court Article III judges in this
3 district -- pardon me -- in this circuit are also wrong.

4 On the commonality of legal interests, I've
5 already mentioned to you the distinction from *Libbey*
6 where you have an active negotiation versus the
7 situation here. And I've also mentioned to you the Wood
8 e-mail. I would also invite the Court to look at the
9 *Fresenius* and the *FM Generator* decisions which are both
10 decisions in which the commonality of legal interest in
11 comparable situations is acknowledged.

12 I'm prepared to move on to the Avaya situation.
13 However, I want to pause there. If there are any
14 questions from the Court about the lucky 13 e-mails, I
15 want to make sure I address those.

16 THE COURT: Do you have any position on their
17 position that it was waived because of the delayed
18 production of the privilege log of Brocade?

19 MR. NEUKOM: I do. The -- there was
20 no -- look, if there was a Court-ordered deadline that
21 we missed, I haven't heard that. The production of
22 privilege logs, remember in the context in which I
23 represent a party which -- whereas, they have produced
24 54,000 pages of documents so far; we've produced two
25 million.

1 We produced the privilege log as quickly as we
2 could. When we priv logged it, we noted all of these
3 redacted items. I think the primary dispute on waiver
4 there is whether we should not have only logged it as
5 privileged, but we should have additionally given it a
6 tag for common interest, which -- which we've given you,
7 I think, three different decisions that say that's not
8 required.

9 THE COURT: Okay. Thank you.

10 MR. NEUKOM: My pleasure.

11 On Avaya, I am going to try -- I am going to
12 try to streamline this for you. By my read, the entire
13 Avaya decision or dispute comes down to this: Did we --
14 by "we," I mean my client. Did Extreme purchase enough
15 of the business or the division from Avaya such that
16 they became the transferee or the inheritor or the
17 acquirer of the attorney/client privilege.

18 We just heard at the podium we haven't proven
19 that to you enough yet. I would note for Your Honor
20 that our opportunity to be heard on this issue was a
21 two-page submission. Within that two-page submission,
22 we cited for you the purchase agreement.

23 According to the purchase agreement, what
24 Extreme did was: They didn't just buy a patent or they
25 just didn't buy naming rights for a product; we

1 purchased the assets. We got the employees from the
2 networking division. And I'll talk briefly in a minute
3 about the --

4 THE COURT: So, was it a purchase of a
5 division? I mean, that's --

6 MR. NEUKOM: Yes.

7 THE COURT: -- how I heard Ms. Weber describe
8 it, as a purchasing of a division.

9 MR. NEUKOM: Well, that was, and under the law,
10 that's allowed. Even under the Ninth Circuit decision
11 which I just read for the first time about 20 minutes
12 ago, that is allowed.

13 The law does not state that whether you buy the
14 entirety of a legal entity versus -- or a business
15 enterprise, even if comprised of multiple legal
16 entities, the question is not did you buy a division
17 versus the business; the question is: Were you buying
18 control of the business?

19 THE COURT: Is that by buying control of a
20 division?

21 MR. NEUKOM: Yes. And I think it's the *Parmac*
22 decision, if I may.

23 Pardon me. It's not *Parmac*. We cited for you
24 the *Parus Holdings versus Banner & Witcoff* decision from
25 the Northern District of Illinois in 2008, which

1 is -- it talks about the division of a company and
2 privilege moving therewith.

3 But more importantly -- right? -- what's better
4 than a perfectly on-point case law citation looking at
5 the underlying legal analysis? And what the case law
6 shows is that the focus of the courts is on whether you
7 were buying a thing, a widget, versus whether you were
8 buying the operating business. And there is no question
9 that that's what we did by my lights.

10 Now, by my lights, versus what the Court will
11 understand were different, given that we have only had a
12 two-page submission. Within that two-page submission,
13 however, we have cited the purchase agreement to you,
14 and what that agreement shows is that rather than buying
15 a patent or a particular product, we bought the assets.
16 We got the employees. We got the customers and the
17 customer relationships. We inherited all the leases.
18 We took their equipment. We got the IP. We got their
19 permits, and we became bound by all ongoing and existing
20 contracts of the division, the business, whatever you
21 want to call it. That scenario -- that's Exhibit C to
22 our most recent two-page submission to you.

23 Now, part of what we heard, and I thought it
24 was a -- it caught my ear -- a good argument was: How
25 are we doing anything other than dividing the privilege,

1 and the courts don't like that?

2 None of this has been briefed, Your Honor, and
3 I have a solution about how we can work with that at the
4 end. But if one understands Avaya, which, in my neck of
5 the woods, was a very big entity for a long period of
6 time in Silicon Valley, Avaya had two pieces of the
7 business; they had the phones business and they had the
8 networking business.

9 When they went into bankruptcy -- I think it
10 was 2016, not 2017, by the way. When they went into
11 bankruptcy, the phones business emerged from bankruptcy
12 reorganization as an ongoing Avaya-branded business.
13 The networking business did not. The networking piece
14 of the business, the division, if you will, was sold to
15 Extreme.

16 So, the idea that there is today an Avaya
17 entity which -- which goes forward and we are
18 duplicatively or confusingly claiming privilege over
19 something that they would, again, we haven't had the
20 opportunity to brief this to you, but that's not quite
21 square with the facts on the ground about what
22 modern-day Avaya looks like versus what Extreme is
23 doing. We took the entirety of their networking
24 business.

25 So, here is my -- and then before I -- and I do

1 want to make a brief note on selective disclosure. I
2 said I would simplify the Avaya issue. To me, it is as
3 follows: The Avaya issue came to you relatively late in
4 the game in relatively truncated submissions, even in
5 the form of this informal discovery.

6 I would ask Your Honor after this informal
7 discovery conference, to the extent that you're not
8 convinced, if Your Honor would like additional briefing
9 on the issue, with each side having -- or at least for
10 my side not having just a two-page submission, if we can
11 fully address, if you want more evidence, about whether
12 did we actually take control of the business, in which
13 point we inherit the attorney/client privilege, or were
14 we just lucky sons of guns who bought an asset and
15 nothing more, at which point we don't get the privilege.

16 So far the Court has heard on that only one
17 exhibit and I think one sentence from us and only oral
18 argument comments from the other side, and before
19 we -- before we tear up privilege, so to speak, I would
20 ask to be heard on that, and I think that might be of
21 benefit to the Court.

22 My final point: The Court asked the question
23 to my friend at opposing counsel table about selective
24 disclosure. I wasn't planning to cite any cases to Your
25 Honor today that weren't in the briefing, but since that

1 has been done, we are aware of Your Honor's decision in
2 the Wolpert case from, I think, about a week ago. There
3 is a very helpful discussion of what does and doesn't
4 constitute selective disclosure.

5 And as I read Your Honor's writing -- I may be
6 on thin ice. As I read Your Honor's writing, there is a
7 discussion of selective disclosure that says, in effect,
8 one is guilty -- those are my words, not the Court's.
9 One is guilty of selective disclosure in a way that
10 you'll be held accountable for, not if you necessarily
11 mention or acknowledge the existence of something, but
12 if you rely upon it for -- and here I am quoting the
13 Court -- "tactical advantage."

14 The idea that we produced documents because we
15 were asked to or we were forced to, the idea that we
16 cited them in an interrogatory answer, in an
17 interrogatory fashioned by opposing counsel in the
18 subject of ongoing demands for greater content, volume,
19 clarity, nothing about that has secured -- I can assure
20 you, nothing about that has secured my client a tactical
21 advantage in this case, and it's pretty distinguishable
22 from that kind of a scenario.

23 THE COURT: So, would it be your position that
24 they were not produced in any way that would go to a
25 defense you're going to assert?

1 MR. NEUKOM: That's right.

2 THE COURT: Okay.

3 MR. NEUKOM: And, look, just to try to salvage
4 a teeny bit of credibility, I will say this: In many
5 cases that line of questioning from the Court could open
6 up some sometimes awkward discussions about the timing
7 of production and the timing of the claw back.

8 In this case, due to the terms of the
9 protective order, we don't have that debate. The
10 parties here have mutually agreed and the Court has
11 ordered that when there is going to be a snapback --
12 right? -- we're not going to get into those other
13 questions.

14 But that doesn't go to the selective disclosure
15 question. That might go to a diligence or a timeliness
16 question, which thankfully here, due to the protective
17 order, both sides specifically are protected from those
18 kinds of questions.

19 THE COURT: Okay. Thank you.

20 MR. NEUKOM: Thank you, Your Honor.

21 MS. PLESSMAN: Your Honor.

22 THE COURT: Yes, Ms. Plessman.

23 MS. PLESSMAN: There have been a number of
24 questions and oral argument relating to Broadcom or
25 Brocade's waiver.

1 THE COURT: Would you mind coming to the
2 podium? Thank you.

3 MS. PLESSMAN: Yes. I was just going to ask if
4 I could address that. Thank you.

5 I wasn't necessarily planning to speak, but
6 since a lot of the discussion focuses on those issues, I
7 thought that I would say something.

8 THE COURT: I appreciate your input. I know
9 you're in a bit of an awkward position, but --

10 MS. PLESSMAN: Yes. Thank you. Yeah. And, I
11 mean, just to get right to the point, to be very clear,
12 I'm happy to be back in Knoxville. We're not happy to
13 be back in this courtroom, necessarily.

14 Plaintiffs had Brocade's privilege log and
15 Extreme's privilege log many, many months before they
16 decided to settle this case. That settlement agreement,
17 like many settlement agreements, contained very broad
18 releases, known, unknown claims, and the primary purpose
19 of that is to avoid coming to defend and litigate the
20 very case that you've just settled, including discovery
21 disputes about whether or not documents were properly
22 preserved or whether the privilege log is untimely or
23 whether or not something should have been logged on the
24 privilege log.

25 So, our first argument would just be: It's not

1 Brocade that waived any arguments; it's plaintiffs that
2 waived and released those arguments when they decided to
3 settle this case. And we should not be brought into
4 this courtroom any time a discovery dispute arises
5 between the parties, and particularly here where it
6 involves a privilege issue that we weren't aware of
7 until August of this year. And we only were alerted to
8 that by Extreme, not plaintiffs. It just simply wasn't
9 on our radar at all.

10 And I just want to address some of the -- so,
11 putting aside the waiver issue, the release issue, the
12 settlement issue, more specifically on the timeliness of
13 the production, as Mr. Neukom alluded to, there was not
14 a specific date in the order on which the privilege log
15 would be produced. And what happened was: The parties
16 discussed when those privilege logs would be produced,
17 and we produced it right around the same time as Extreme
18 and plaintiffs did. I don't recall the exact date, but
19 it was the summer of 2022, I believe.

20 In those privilege logs, and, again, plaintiffs
21 have had those privilege logs, it -- we didn't have the
22 documents in question, as you know from our papers.
23 They just weren't in our possession at the time. The
24 employees in question had left long ago, before the
25 litigation commenced. Just didn't have them.

1 Then there is the issue of whether or not we
2 then had the duty to comb through what was hundreds of
3 thousands of documents that had been produced in this
4 case, find redacted documents that were produced by
5 Extreme and log this privilege, not even a
6 common-interest privilege, which they're allowed to do
7 but wouldn't necessarily alert us to an issue, and then
8 look at the redacted documents and determine whether or
9 not we then need to add those documents to our privilege
10 log and note that they're -- that they were somehow
11 related to us or our privilege.

12 There is simply no legal duty to do that. They
13 weren't in our possession, and we hadn't even reviewed
14 all of the documents that had been produced in this
15 case. And, again, not alerted to this issue until long
16 after settlement.

17 Plaintiffs, on the other hand, if this was
18 their issue, if this is the issue they cared about, they
19 had both privilege logs. They could have raised it
20 before they settled. They could have raised it and this
21 could have been an issue that was raised before the
22 Court. It's too late now.

23 And then finally, I would just say that the --
24 and I think Mr. Neukom already addressed this, but we
25 don't have a duty to log documents that we don't

1 possess. And that's simply what happened here. And,
2 so, there can't be a waiver of documents because it
3 wasn't logged on a privilege log where we didn't even
4 possess the documents in the first place.

5 I'm happy to address any other questions. I
6 think Mr. Neukom, I'm going to defer to him on the
7 common-interest privilege and those issues. But I
8 simply wanted to address this -- this idea that somehow
9 they can continue raising issues relating to our
10 discovery, our production of documents, our logging of
11 privilege issues because, frankly, this could keep
12 coming up, and we don't want to be dragged back into the
13 courtroom any time that comes up because we think those
14 issues were resolved when the parties settled.

15 THE COURT: Thank you.

16 MS. PLESSMAN: Thank you.

17 MR. LEE: Your Honor, could I -- I really want
18 to talk.

19 THE COURT: Mr. Lee.

20 MR. LEE: Can I, just from a big-picture
21 standpoint, for just five minutes?

22 THE COURT: Certainly. And then I'll allow
23 Ms. Weber to respond. Then I'll take a brief recess
24 before we --

25 MR. LEE: Okay. Thank you.

1 THE COURT: -- conclude.

2 MR. LEE: On the issue of the common-interest
3 agreement, and I understand it's really not a
4 privilege --

5 THE COURT: It's a doctrine.

6 MR. LEE: -- it's attorney/client privilege
7 materials, and then you have a common-interest
8 agreement, and the question is whether you produce
9 materials under that common-interest agreement. Does
10 that constitute a waiver? That's kind of what it gets
11 down to on the common-interest issue.

12 And I would suggest to the Court that -- I
13 mean, the Court's decision on this has, obviously,
14 impact on this case, but it has a much broader impact in
15 the business world in that companies are bought or
16 attempted to be bought every day.

17 Corporate lawyers, my colleagues and other
18 people's colleagues, they -- they enter into
19 confidentiality agreements to enter into a due diligence
20 phase to try to buy or look to buy a company.

21 Say it's a restaurant chain and it has 50
22 restaurants and you're trying to gather information as
23 to whether you want to buy this for what price, whether
24 you need to get indemnity for certain threats that are
25 out there, legal and non-legal.

1 So, you enter into a confidentiality or
2 common-interest agreement. And under that there is a
3 sharing of privileged information. What do your leases
4 look like? Do you have any holes in your leases? You
5 know, and they -- so, you're looking before you leap,
6 before you purchase.

7 What do your vendor contracts look like? If
8 you're a restaurant that, for example, serves Impossible
9 Burgers, you know, do you have that properly licensed
10 where you can put that name on your menu? You, as the
11 seller's counsel and the seller, you're looking for that
12 due diligence.

13 And I think the courts and society want there
14 to be full disclosure because you don't want to buy a
15 pig in a poke. You want to encourage there to be full
16 disclosure between buyer and seller so that the market
17 functions effectively and you know what you're buying.

18 To the extent that producing privileged
19 materials under a common-interest agreement, to the
20 extent the Court rules that's a waiver, that would be at
21 odds with almost all corporate law; Delaware,
22 everywhere. And there are transactions every day, and I
23 don't think the Court wants to have a chilling effect,
24 because the outcome then is the seller is not going to
25 tell you about this stuff. We have a problem with our

1 lease but we're not going to tell you about it. We have
2 a problem with our vendor agreements but we can't tell
3 you about it. There needs to be this full and frank
4 disclosure as part of this -- whether it's an asset
5 purchase, a letter of intent, or at each step down the
6 road, even after a letter of intent is signed.

7 I think the Court needs the big picture to be
8 encouraging that sort of disclosure within the confines
9 of the confidentiality agreement, and that does not
10 constitute a waiver.

11 That's just my big-picture point of view.
12 Thank you.

13 THE COURT: Thank you, Mr. Lee.

14 Ms. Weber.

15 MS. WEBER: Thank you, Your Honor. I'll make a
16 few brief points.

17 I agree with Mr. Lee that I think a ruling on
18 this common-interest doctrine issue could have a big
19 impact in the business world, and that is our very
20 point.

21 And to the extent that, as Mr. Lee says,
22 parties who are negotiating a transaction are worried
23 about things like legal risk, then they can enter into a
24 common-interest agreement to note their common purpose
25 in jointly analyzing the shared legal risk that the

1 parties might be getting into.

2 That's not what happened here. There are
3 plenty of protections that Brocade and Extreme as
4 sophisticated parties could have provided for in the
5 confidentiality agreement, in the APA. They didn't.

6 THE COURT: But you would agree there did not
7 need to be a separate common-interest agreement.

8 MS. WEBER: I think that there needed to be a
9 clear indication and evidence provided to meet their
10 burden to show that there was a joint pursuit of a legal
11 analysis. That's not just something that percolates up
12 from the business interest.

13 THE COURT: Separate from a
14 confidentiality -- a general confidentiality agreement.

15 MS. WEBER: Than the one we have here, yes,
16 Your Honor. I do think that's the case.

17 And my next point, I think -- I've already made
18 this point. I'll just make it again really quick. You
19 don't have to get to the waiver issue. I think the 22
20 Brocade/Extreme e-mails that we're asking for to be
21 produced unredacted can still be produced if you find
22 that Extreme has not met its burden to show that the
23 common-interest doctrine applies here.

24 My third point: Jay had mentioned that in
25 September 2017, Mr. Wood reached out to -- or, I guess,

1 responded to Brocade, asked for a little bit more
2 information about what they planned to do with the
3 license agreement. That happened months after the
4 agreements that they are pointing to as the anchoring
5 point of the common-interest doctrine in this case.
6 They still don't point to any agreement. They point to
7 kind of a reaction.

8 And I'll point out something about the timing.
9 Jay said something to the effect of the one result that
10 the parties wanted, and at this point in late September,
11 early October of 2017, the one result that the parties
12 wanted was to close the deal. And, in fact, they had to
13 extend it a little bit. It was supposed to close, I
14 think, in late September, and it ended up closing in
15 late October. So that is the one result and why they
16 wanted to finally get permission from the last lingering
17 parties who hadn't, for one reason or another, agreed to
18 a contract assignment, and that's what they're trying to
19 make happen so that they could close this deal.

20 I'll point out, my friend Jay mentioned two
21 cases, *Fresenius*, *FM Generator*. *Fresenius* is a great
22 example of actual litigation being involved. Nabi in
23 that case communicated with a third party because it was
24 taking over the patent prosecution from that third
25 party. So, that's the -- I think that just underscores

1 what we're arguing as required under the common-interest
2 doctrine.

3 And then *FM Generator* does point out the
4 requirement for the pursuit of a common legal
5 enterprise. I don't think we have anything like that in
6 this case. There were legal issues that percolated up.

7 And there was also a note in that case that
8 there was explicit evaluation of assessing risk
9 corresponding to existing contractual obligations.

10 With respect to Avaya and whether Extreme
11 proved it enough, I'll note -- I think there were, like,
12 five lines at the end of their brief that they left
13 blank. They did not ask for leave to submit more
14 evidence. But I don't think submitting more evidence
15 would help here because the point is still the same;
16 they're asking you to split the privilege between the
17 Avaya entity that still exists and now the assets that
18 Extreme owns.

19 We don't think that that would be the correct
20 result, and, in fact, you could argue that the same
21 thing happened with Brocade because Extreme bought a
22 division from Brocade. They're not making the argument
23 that the transfer of privilege occurred once they bought
24 that division; now they have Brocade's privilege. They
25 didn't make that argument.

1 My last point: I think the assertions that we
2 violated the settlement agreement, we obviously don't
3 agree with, and we're happy to submit the settlement
4 agreement for Your Honor to review if Brocade agrees.
5 Just let us know, please.

6 Thank you.

7 THE COURT: Okay.

8 MS. WEBER: Unless you have any questions.

9 THE COURT: Let me -- so, let me just go back
10 to the common-interest --

11 MS. WEBER: Okay.

12 THE COURT: -- privilege. Mr. Neukom had
13 argued that there was no need for the anticipation of
14 litigation, and you had argued that, and I just wondered
15 if there was anything you had to add in response to --

16 MS. WEBER: I don't think --

17 THE COURT: -- what he said.

18 MS. WEBER: Sorry. I don't think there is any
19 additive. Just that we would still point to the same
20 three cases, *Adkisson*, I think *Gammons*, and *Boyd*. We
21 believe it is required.

22 But even if it's not required, we still don't
23 think they have shown the common legal interest that's
24 required under the case law in the first place.

25 So, under either iteration, their view or our

1 view of the law, we think they haven't met their burden
2 to show the common-interest doctrine is extended here.

3 THE COURT: Okay.

4 MS. WEBER: Thank you.

5 THE COURT: All right. Well, I'm going to take
6 a brief recess to see if there is any other questions I
7 need to ask before we conclude today. So, we'll stand
8 in a brief recess.

9 THE COURTROOM DEPUTY: All rise. This
10 honorable court stands in recess.

11 (A brief recess was taken.)

12 THE COURT: Okay. Before we recess for the
13 day, I do want to request supplemental briefing on three
14 topics, and I want all three topics addressed in
15 one -- your one briefing document that for each side is
16 a limit of 25 pages.

17 So, these are the three issues: First, whether
18 Extreme, in responding to the interrogatory request,
19 whether that operated as an intentional waiver of the
20 privilege, and, of course, if so, go through the 502(a)
21 factors, include that. Second, whether there was a
22 transfer of privilege from Avaya to Extreme. And,
23 third, I want you to address the claim of privilege with
24 respect to Avaya's employee communications because I
25 didn't -- I feel like I didn't hear enough about that

1 today.

2 So, given that Extreme has the burden, I want
3 to ask them -- I don't want these simultaneous. I want
4 Extreme to go first, especially since it sounds like
5 they wanted to provide additional information as to
6 Avaya and that transaction. So, I would ask that
7 Extreme have its opening brief by November 15th. Does
8 that work?

9 MR. NEUKOM: That does. Thank you, Your Honor.

10 THE COURT: Okay. And then for SNMP, I would
11 like to have your responding brief by December the 1st.
12 I'm giving you a couple of days because of the
13 Thanksgiving holiday. So, it's just a little beyond two
14 weeks.

15 And I'm going to ask that you actually file
16 your briefs on ECF. While this is an informal discovery
17 dispute, I feel like I'm requesting this additional
18 information. You may have declarations or such to
19 submit, so I would feel that -- I feel it's more
20 appropriate to have that filed on ECF at this time.

21 So, I'm going to do a short order reflecting
22 that I've asked for additional briefing and the parties
23 are asked to file that on the record.

24 Okay. So, is there anything else then we need
25 to take up?

1 MR. LEE: Your Honor, procedurally -- or, go
2 ahead.

3 MR. NEUKOM: Sorry. Is this the stuff that we
4 discussed?

5 MR. LEE: Yes.

6 MR. NEUKOM: I'm comfortable with that for now.

7 MR. LEE: Okay. All right.

8 MR. NEUKOM: I have one question, which is: I
9 think I have a very clear understanding of what Your
10 Honor would like us to address with points one and
11 number two.

12 THE COURT: Yes.

13 MR. NEUKOM: If you asked me to repeat back
14 what we should address on point number three, I don't
15 think I could do a very good job of it. So, may I ask
16 the Court just to -- even if it's saying the same thing
17 all over again --

18 THE COURT: Yes, it's with respect to the
19 employee communications. As the way I understood from
20 the position statements, I need to consider perhaps
21 whether those communications between the employees were
22 done at the direction of or for information that was
23 going to go back to Mr. Hamilton as legal counsel. And,
24 so, I need to -- I need to understand more about the
25 communications amongst the employees and why those were

1 taking place.

2 MR. NEUKOM: Understood. So, is it scenario
3 one, two employees, non-lawyers, e-mailing about a new
4 product launch that's not privileged?

5 THE COURT: Right.

6 MR. NEUKOM: Is it, instead, two employees
7 doing something covered by privilege?

8 THE COURT: Collecting -- were they directed to
9 collect information that was going back to be used by
10 legal counsel.

11 MR. NEUKOM: Understood. Thank you.

12 THE COURT: Okay. All right. Anything further
13 on behalf of SNMP?

14 MR. WOOD: Nothing from plaintiffs, Your Honor.

15 THE COURT: Okay. All right. Thank you for
16 your presentations today.

17 MR. WOOD: Thank you.

18 MR. NEUKOM: Thank you.

19 MR. LEE: Thank you, Your Honor.

20 THE COURTROOM DEPUTY: All rise. This
21 honorable court stands adjourned.

22 (Which were all the digitally-recorded
23 proceedings had and herein transcribed.)

24 * * * * *

25

1 C-E-R-T-I-F-I-C-A-T-E

2 STATE OF TENNESSEE

3 COUNTY OF KNOX

4 I, Teresa S. Grandchamp, RMR, CRR, do hereby
5 certify that I reported in machine shorthand the above
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7 were transcribed, to the best of my ability to hear and
8 understand the recorded file, under my personal
9 supervision, and constitute a true and accurate record
10 of the digitally-recorded proceedings.

11 I further certify that I am not an attorney or
12 counsel of any of the parties, nor an employee or
13 relative of any attorney or counsel connected with the
14 action, nor financially interested in the action.

15 Transcript completed and signed on Tuesday,
16 November 7, 2023.

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TERESA S. GRANDCHAMP, RMR, CRR
Official Court Reporter